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17 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
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19 IN AND FOR THE COUNTY OF YAVAPAI

20 STATE OF ARIZONA

21 Plaintiff,

22 vs.

23 STEVEN CARROLL DEMOCKER,

24 Defendant.

25) No. CR 2008-1339

26) Division 6

27) **MOTION TO DISMISS THE**
28) **DEATH PENALTY NOTICE FOR**
) **LACK OF PROBABLE CAUSE**
) **OR, IN THE ALTERNATIVE,**
) **FOR A PROBABLE CAUSE**
) **HEARING ON THE STATE'S**
) **NOTICED AGGRAVATING**
) **CIRCUMSTANCES**

(Oral Argument and Evidentiary
Hearing Requested)

29 Pursuant to Rules 5, 13.5, and 16 of the Arizona Rules of Criminal Procedure,
30 due process, and the Arizona and U.S. Constitution, Defendant Steven DeMocker
31 requests that this Court dismiss the death penalty for lack of probable cause or, in the
32 alternative, for a probable cause hearing on the State's noticed aggravating
33 circumstances. This Motion is supported by the following Memorandum and Points of
34 Authorities.

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MEMORANDUM OF POINTS AND AUTHORITIES

10 Rule 5 of the Arizona Rules of Criminal Procedure requires the State to prove
11 that probable cause exists as to the aggravating circumstances it has alleged in support
12 of its notice of intent to seek the death penalty against Mr. DeMocker. *See* Ariz. R.
13 Crim. P. 5.3(a) (“[T]he magistrate shall determine and state for the record whether the
14 prosecution’s case establishes probable cause.”) *See also Chronis v. Steinle*, 220 Ariz.
15 559, 208 P3d 210 (2009) (holding Rule 13.5(c) permits a probable cause hearing on
16 aggravators).

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BACKGROUND

26 On October 27, 2008, the State filed its Notice of Intent to Seek the Death
27 Penalty against Mr. DeMocker alleging three aggravating factors; A.R.S. §13-
28 703(f)(2)¹, that the defendant has been or was previously convicted of a serious offense;
§13-703(f)(5)², that the defendant committed the offense for pecuniary gain, and §13-
703(f)(13)³, that the defendant committed the offense in a cold, calculated and cruel
manner. On October 31, 2008 the State obtained an Indictment charging Mr. DeMocker
with one count of first degree murder and one count of aggravated burglary. On
November 21, 2008, the State filed an amended Notice of Intent to Seek Death Penalty
adding an additional aggravating factor, §13-703(f)(12)⁴, that the offense was
committed to prevent a person’s cooperation with or in retaliation for a person’s
cooperation with an official law enforcement proceeding or testimony in court
proceedings. The Court granted Mr. DeMocker’s Motion for a New Finding of
Probable Cause on January 22, 2009. Thereafter, on February 6 the Grand Jury again
indicted Mr. DeMocker on the same charges, and Mr. DeMocker was arraigned on

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¹ Renumbered as A.R.S. § 13-751 (f)(2) and amended by Laws 2008, Ch. 301 §§ 26, 38, eff. Jan. 1, 2009.

² Renumbered as A.R.S. § 13-751 (f)(5) and amended by Laws 2008, Ch. 301 §§ 26, 38, eff. Jan. 1, 2009.

³ Renumbered as A.R.S. § 13-751 (f)(13) and amended by Laws 2008, Ch. 301 §§ 26, 38, eff. Jan. 1, 2009.

⁴ Renumbered as A.R.S. § 13-751 (f)(12) and amended by Laws 2008, Ch. 301 §§ 26, 38, eff. Jan. 1, 2009.

1 February 10, 2009. On May 13, 2009 the State alleged the same four aggravating
2 factors in support of its Notice of Intent to Seek the Death Penalty against Mr.
3 DeMocker. On June 29, 2009 the State amended its Notice of Intent to Seek the Death
4 Penalty to add a fifth alleged aggravating circumstance, §13-703(f)(6),⁵ that the
5 defendant committed the offense in an especially heinous, cruel or depraved manner.⁶
6 On the same day, the State filed its disclosure pursuant to Rule 15.1(i)(3) and stated that
7 it would not present any additional witnesses, expert witnesses, or evidence at the
8 “aggravating hearing” other than what is offered in the innocence-guilt phase of the
9 proceedings, in support of any of its alleged aggravating circumstances.

10 The State’s Notice alters the crime charged in the Indictment from murder to the
11 greater offense of capital murder.⁷ The State ignored counsel’s February 5, 2009 letter
12 requesting that the State submit the aggravating factors to the Grand Jury, and to date,
13 there has been no probable cause finding as to these alleged elements of the offense of
14 capital murder.

15 ARGUMENT

16 A finding of probable cause “presupposes that a *prima facie* case has been
17 established and that a mere suspicion that an accused is guilty of the offense of which he
18 is charged is not sufficient.” *See Drury v. Burr*, 107 Ariz. 124, 483 P.2d 539 (1971)
19 *citing State v. Abbot*, 103 Ariz. 336, 442 P.2d 80 (1968). *See also* Comment to Rule
20 5.4(a) (“The rule intends no change in the standard for determining probable cause.”)
21 Where two possible inferences are equally reasonable, probable cause does not exist,
22 rather one inference must be more reasonable than the other. *Id.* On balance, to support
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24 ⁵ Renumbered as A.R.S. § 13-751 (f)(6) and amended by Laws 2008, Ch. 301 §§ 26, 38, eff. Jan. 1, 2009.

25 ⁶ Under Arizona Rules of Criminal Procedure, Rule 15.1(i) the prosecutor is required to file its notice of intent to
26 seek the death penalty no later than 60 days after the arraignment, although this period can be extended for 60 days
upon written stipulation and approval of the court. No stipulation or court approval was granted for the State’s late
filing of this notice. Counsel will file separate motions asserting additional challenges to this procedure.

27 ⁷ Counsel will file separate motions asserting additional constitutional and other challenges to the death penalty
notice, the alleged aggravators and Arizona’s death penalty statutes and rules.

1 a finding of probable cause there must be more evidence for, rather than against,
2 defendant's guilt. *Hafenstein v. Burr*, 92 Ariz. 321, 322, 376 P.2d 782, 783 (1962).

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4 **I. The State has failed to meet its burden to show that probable cause exists**
5 **that Mr. DeMocker has been or was previously convicted of a serious**
6 **offense, whether preparatory or completed, and this aggravating**
7 **circumstance should be dismissed.**

8 A.R.S. § 13-751(f)(2) provides that if the defendant has been or was previously
9 convicted of a serious offense, whether preparatory or completed, the jury shall consider
10 it an aggravating circumstance. It goes on to provide that "[c]onvictions for serious
11 offenses committed on the same occasion as the homicide, or not committed on the
12 same occasion but consolidated for trial with the homicide, shall be treated as a serious
13 offense under this paragraph." Serious offense is defined by enumeration in A.R.S. §
14 751(i). Although the State has not indicated which "serious offense" it is alleging Mr.
15 DeMocker either has been or was previously convicted of, burglary in the first degree,
16 as charged in Count II of the Indictment, is an enumerated "serious offense" under §
17 751(i).

18 To support a probable cause finding for this aggravating circumstance, the State is
19 required to present "substantial evidence" that Mr. DeMocker will be convicted of first
20 degree burglary. A conviction for first degree burglary requires a showing of unlawful
21 entry or unlawfully remaining on the residential property of another, with intent to
22 commit a felony therein, while armed with a deadly weapon or dangerous instrument.
23 A.R.S. §§ 1507, 1508. The State has failed to present any evidence to support this
24 aggravating circumstance and it should therefore be dismissed.

25 The State has presented no evidence that Mr. DeMocker entered or unlawfully
26 remained on the Bridle Path residence, and has instead disclosed evidence of an
27 unknown male (or males) presence there. The State has also not disclosed any evidence
28 to support its allegation that Mr. DeMocker intended to commit theft or some other

1 felony when he allegedly entered the property. Finally, the State has provided no
2 evidence that Mr. DeMocker possessed a deadly weapon or dangerous instrument, in
3 particular a golf club, as specifically alleged in the Indictment.

4 After a four day evidentiary hearing in this matter, the Court issued an Under
5 Advisement Ruling on January 22, 2009 denying the State's request to hold Mr.
6 DeMocker in custody without bond (hereinafter "*Simpson Order*"). The following
7 findings of the Court are relevant to the State's unsupported allegation of burglary as an
8 aggravating circumstance:

- 9 (1) unknown male DNA which did not match Mr. DeMocker was found on light
10 bulbs which were unscrewed in the victim's laundry room, (*Simpson Order* pg.
11 3);
- 12 (2) unknown male DNA which did not match Mr. DeMocker was found on a door
13 handle at the victim's home, (*Id.*);
- 14 (3) a search of Mr. DeMocker's residence for evidence on "clothes, showers and
15 sinks, washer and dryer, and the drains or lint collector for blood or DNA
16 evidence connecting Defendant to the scene" revealed "no blood, DNA or other
17 physical evidence was found through these methods that would tie the Defendant
18 to the victim or her residence," (*Id.* at 4);
- 19 (4) "[n]o physical evidence in the form of DNA samples or fingerprints of the
20 Defendant was found at the scene of the crime," (*Id.* at 5);
- 21 (5) "[n]o testimony was presented to show that any person saw a man resembling the
22 Defendant at or near the scene at any time proximate to the occurrence of the
23 offense," (*Id.* at 6);
- 24 (6) "no physical evidence truly connects the Defendant to the scene, (*Id.*)

1 (7) although Mr. DeMocker may have at some point earlier taken a golf club to the
2 victim's residence, "[n]o truncheon or golf club or other weapon has been
3 found," (*Id.* at 6); and

4 (8) the victims' injuries were "consistent with" the shaft of a golf club and a # 7 Big
5 Bertha cannot be ruled out, but the forensic anthropologist "suggested other
6 implements could possibly cause the skull injuries and should be compared; no
7 other implements have yet been compared." (*Id.* at 2).

8 This evidence has not changed after more than a year of investigation by the
9 State. The State has failed to present "substantial evidence" that Mr. DeMocker
10 unlawfully entered or remained in the victim's home, that he intended to commit some
11 felony when he allegedly entered the property or that he possessed a dangerous or
12 deadly weapon in the form of a golf club. The State has therefore failed to meet its
13 burden to support a finding of probable cause for its allegation that Mr. DeMocker will
14 be convicted of burglary and this aggravating circumstance should be dismissed.

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16 **II. The State has failed to meet its burden to show that probable cause exists**
17 **to support its allegation that Mr. DeMocker committed the offense as**
18 **consideration for the receipt, or in expectation of the receipt, of anything**
19 **of pecuniary value and this aggravating circumstance should be**
20 **dismissed.**

21 The State has failed to provide the required "substantial evidence" to support a
22 probable cause finding that Mr. DeMocker committed the alleged offense for pecuniary
23 gain. To establish this aggravator, "pecuniary gain [must be] a motive, cause, or
24 impetus for the murder and not merely the result of the murder." *State v. Spears*, 184
25 Ariz. 277, 292, 908 P.2d 1062, 1077 (1996). *See also State v. Spencer*, 176 Ariz. 36, 43,
26 859 P.2d 146, 153 (1993); *State v. Correll*, 148 Ariz. 468, 479, 715 P.2d 721, 732
27 (1986) (noting that pecuniary gain does not exist in every case where "a person has been
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1 killed and at the same time defendant has made a financial gain"). Where two possible
2 inferences are equally reasonable, probable cause does not exist. *Id.*

3 The following findings of this Court after a four day evidentiary hearing are relevant
4 to the State's unsupported allegation of Mr. DeMocker's financial motive:

- 5 (1) "[a] motive does not seem apparent to the Court," (*Simpson* Order pg. 5);
6 (2) "[t]he evidence received did not provide a motive for a homicide," (*Id.*);
7 (3) "[n]o financial motivation has been demonstrated," (*Id.*);
8 (4) third party creditors could go after Mr. DeMocker after the victim's death for
9 community debt – casting doubt on the speculation that he was better off
10 financially after the divorce, (*Id.* at 6);
11 (5) while the victim may have been dissatisfied with the results of the divorce
12 decree, Mr. DeMocker was not, (*Id.* at 5-6); and
13 (6) although both parties had heavy debt and expenditures, Mr. DeMocker "had
14 significant income and prospects for continuing income." (*Id.* at 5).

15 Once again the State has failed to meet its burden to support a finding of probable
16 cause on this aggravating circumstance. There simply is no evidence that Mr.
17 DeMocker was motivated by any financial gain to commit the alleged offense, as this
18 Court has previously found. The State has failed to prove a "*prima facie* case" for this
19 aggravating circumstance and "mere suspicion ... is not sufficient" - it should therefore
20 be dismissed.

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22 **III. The State has failed to meet its burden to show that probable cause exists**
23 **to support its allegation that Mr. DeMocker committed the offense to**
24 **prevent the victim's cooperation or in retaliation for her cooperation**
25 **with an official law enforcement investigation or testimony in a court**
proceeding and this aggravating circumstance should be dismissed.

26 This aggravating circumstance requires a showing that an offense was committed for
27 the purpose of either preventing a victim's cooperation with or in retaliation for the

1 victim's cooperation with a law enforcement investigation or testimony in a court
2 proceeding. The State has failed to prove that probable cause exists to support this
3 aggravating circumstance. The State has not even alleged that there was an official law
4 enforcement investigation underway at the time of the victim's murder. Nor have they
5 presented any evidence of any potential court testimony of Ms. Kennedy. Certainly
6 there has been no showing that Mr. DeMocker was aware of Ms. Kennedy cooperating
7 in any official law enforcement investigation or that she was to provide testimony in any
8 court proceeding. The parties divorce was final on May 28, 2008 and, as this Court
9 noted, Mr. DeMocker was not unhappy with the terms. (*Simpson* Order at 5-6). This
10 Court found that the State "has not shown evidence that ... Steven DeMocker was
11 aware of any intent by Carol Kennedy to report him to the IRS," (*Id.* at 2-3), and that
12 "[t]he Court has not been shown evidence that there was fraud or perjury in the financial
13 affidavit or in obtaining the disposition in the divorce or on tax returns." (*Id.* at 2)
14 There is no "substantial evidence" to support a probable cause finding for this
15 aggravating circumstance and it should therefore be dismissed.
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17 **IV. The State has failed to meet its burden to show that there is probable**
18 **cause that Mr. DeMocker committed the alleged offense "in a cold,**
19 **calculated manner without pretense of moral or legal justification" and**
this aggravating circumstance should be dismissed.

20 A.R.S. § 13-751(f)(13) provides that the jury shall consider as an aggravating
21 circumstance that "the offense was committed in a cold, calculated manner without
22 pretense of moral or legal justification." As the legislative history of this 2005
23 amendment to § 13-751 indicates, this aggravating circumstances was adopted to cover
24 "thrill kill" cases. Paul McMurdie, then a deputy county attorney for Maricopa County
25 who handled capital cases, explained the need for the additional aggravating factors,
26 (f)11-13, to the Senate Judiciary Committee as follows: "[c]ases where the killing was
27 simply for gang initiation or to promote a criminal street gang or criminal syndicate
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1 [(f)(11)], or killing to eliminate a particular witness [(f)(12)], or simply thrill kill
2 [(f)(13)].”

3 The State has also failed to present the required “substantial evidence” that this
4 offense was committed “in a cold, calculated manner without pretense of moral or legal
5 justification.” The State has variously alleged that Mr. DeMocker committed the
6 offense in a state of rage and anger or that this was a meticulously planned offense that
7 ended with Mr. DeMocker attacking the victim in her home while she was speaking on
8 the phone. While the State has speculated to the two grand juries about each theory, it
9 has provided actual evidence of neither. And it has in no way suggested that this was a
10 “thrill kill” case. As Arizona courts have repeatedly recognized, the death penalty
11 should not be imposed in every capital murder case but, rather, it should be reserved for
12 cases in which either the manner of the commission of the offense or the background of
13 the defendant places the crime “above the norm of first-degree murders.” *State v.*
14 *Hoskins*, 199 Ariz. 127, 163 ¶ 169, 14 P.3d 997, 1033 ¶ 169 (2000) (dissent) (quoting
15 *State v. Blazak*, 131 Ariz. 598, 604, 643 P.2d 694, 700 (1982)); *State v. Zaragoza*, 135
16 Ariz. 63, 68-69, 659 P.2d 22, 27-28 (1983) (“either the circumstances of the killing are
17 so shocking ... or the background of the murderer sets him apart from the usual first
18 degree murderer.”). Here, there is no evidence that whoever committed this crime did
19 so in a “cold, calculated manner,” assuming the jury is able to divine the meaning of
20 that term. For these reasons, this aggravating circumstance should be dismissed.

21 The State has failed also to provide “sufficient evidence” to support a probable cause
22 determination that Mr. DeMocker committed this offense. The State has no physical
23 evidence that Mr. DeMocker committed the offense (*Simpson* Order at 4-5), no one saw
24 him at or near the scene at the time of the offense (*Id.* at 6), there is no evidence to
25 support any alleged motive (*Id.* at 5), and there is evidence of unknown male DNA
26 underneath the fingernail of the victim, on unscrewed light bulbs at the victim’s home
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1 and on a door handle, indicating that someone else committed the offense. At the
2 conclusion of four days of testimony on the *Simpson* hearing the Court noted that
3 “[t]hough the actions and statements of the Defendant have properly given rise to
4 suspicion, more is required.” (*Id.* at 6) Likewise, mere suspicion is insufficient for a
5 showing of probable cause. *See Drury v. Burr*, 107 Ariz. 124, 483 P.2d 539. Where
6 two possible inferences are equally reasonable, probable cause does not exist; rather,
7 one inference must be more reasonable than the other. *Id.* The State has failed to meet
8 its burden to show probable cause that Mr. DeMocker committed this offense and this
9 aggravating circumstance should be dismissed.

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11 **V. The State has failed to meet its burden to show that there is probable**
12 **cause that Mr. DeMocker committed the alleged offense in an especially**
13 **heinous, cruel or depraved manner and this aggravating circumstance**
14 **should be dismissed.**

15 This aggravating factor suffers from the same failure by the State to provide
16 “sufficient evidence” to support a probable cause determination that Mr. DeMocker
17 committed the alleged offense. Additionally, the State has not provided notice of which
18 term of this disjunctive aggravating circumstance it is alleging. Election must be made
19 by the State to insure jury unanimity and to provide Mr. DeMocker with constitutionally
20 sufficient notice of this aggravating circumstance.

21 Both the Arizona and the U.S. Supreme Courts have held that this aggravating
22 circumstance is unconstitutionally vague. *See Walton v. Arizona*, 497 U.S. 639, 654,
23 110 S Ct. 3047, 3057 (1990) overruled on other grounds by *Ring II*, 536 U.S. at 608-
24 609, 122 S Ct. at 2428; *see also Woratzeck v. Lewis*, 863 F. Supp. 1079 (1994). Both
25 courts also determined that further definition of the vague terms provided sufficient
26 sentencing guidance where the sentencer is a judge and where an appellate court
27 conducts *de novo* review of the sentencing determination. As the *Woratzeck* court noted
28 “[t]he fact that a trial judge performs the sentencing calculus is of *critical significance*

1 for it would seem the necessity that a limiting construction specify what constitutes a
2 heinous, cruel or depraved murder is directly proportional to the limited experience and
3 resources upon which the sentencer may draw to evaluate the facts presented and make
4 the required individualized determination as to the appropriateness of the death
5 penalty.” 863 F. Supp. at 1087 (emphasis added). The court in *Walton* was likewise
6 focused on the differences between judge and jury sentencing. “Trial judges are
7 presumed to know the law and to apply it in making their decisions.” *Walton*, 497 U.S.
8 at 653, 110 S Ct. at 3057.

9 Post *Ring*, the Arizona Supreme Court has held that detailed and extensive jury
10 instructions as to what would constitute a finding that murders were “especially
11 heinous, cruel or depraved” may narrow and define the terms in a constitutionally
12 sufficient way for jury sentencing where a defendant did not object to the instructions.
13 *State v. Anderson*, 210 Ariz. 327, 111 P.3d 369 (2005).⁸ Under *Anderson*, the State, to
14 support a finding of probable cause for its allegation of either an “especially heinous” or
15 “especially depraved” manner, must provide substantial evidence of Mr. DeMocker’s
16 “mental state and attitude at the time of the offense as reflected by his words and
17 actions.” *Id.* at fn 19. In order to support a finding of heinousness or depravity, the
18 State is required to show that Mr. DeMocker exhibited such a mental state by one of the
19 following acts – none of which has been either factually alleged or supported by the
20 State in this case – (1) “relishing” the murder, which must be shown by words or
21 actions; or (2) inflicting gratuitous violence beyond that necessary to kill; or (3)
22 needless mutilation. There has been no evidence to support any allegation as to Mr.
23 DeMocker’s mental state by his words and actions, nor has the State alleged gratuitous
24 violence or mutilation.

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26
27 ⁸ Counsel intends to separately file additional motions regarding the constitutionality of *Anderson*.

1 The State must provide substantial evidence of the victim's mental state to support a
2 finding of probable cause that the offense was committed in an "especially cruel"
3 manner. "Cruelty requires proof that the victim 'consciously experienced physical or
4 mental pain prior to death and the defendant knew or should have known that suffering
5 would occur.'" *State v. Newell*, 212 Ariz. 389, 406, 132 P.3d 833, 850 (2006) citing
6 *State v. Trostle*, 191 Ariz. at 18, 951 P.2d at 883. Again, the State has offered no
7 evidence of Ms. Kennedy's mental state to support this version of this aggravating
8 circumstance.

9 The evidence, as determined by this Court after the *Simpson* hearing, is that Ms.
10 Kennedy was killed by seven blows to her skull and there is bruising on her arms and
11 shoulder. (*Simpson* Order pg. 2). The forcible infliction of these blows was, the Court
12 found, "indicative of a premeditated murder." (*Id.* pg. 5). However, the State has
13 provided no evidence of either Mr. DeMocker's or Ms. Kennedy's mental state as
14 required to support a finding of probable cause of alleged aggravating factor. No
15 "prima facie case" for this aggravating factor has been demonstrated by the State and
16 for these reasons, it should be dismissed.

17 18 CONCLUSION

19 Mere suspicion and innuendo are insufficient to support a finding of probable
20 cause. The State has failed to meet its burden of providing "substantial evidence" that is
21 sufficient to establish a "*prima facia* case," it has failed to prove that there is "more
22 evidence for, rather than against," the alleged aggravating circumstances.

23 For those reasons, the State's Notice of Intent to Seek the Death Penalty should be
24 dismissed. In the alternative, Mr. DeMocker requests that the Court hold a probable
25 cause hearing on the State's noticed aggravating circumstances.

1 DATED this 25th day of August, 2009.

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15 ORIGINAL of the foregoing filed
16 this 25th day of August, 2009, with:

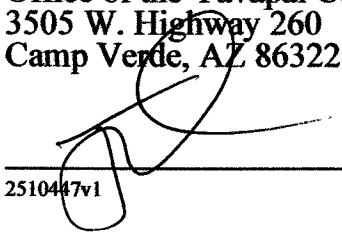
17 Jeanne Hicks,
18 Clerk of the Court
19 Yavapai County Superior Court
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22 COPIES of the foregoing hand delivered
23 this 25th day of August, 2009, to:

24 The Hon. Thomas B. Lindberg
25 Judge of the Superior Court
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